90-958

NO. 90-722

Supreme Court, U.S.
FILED
DEC 5
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA
Intervenor-Petitioner

VERSUS

CURTIS CAMPO, JR.
Plaintiff-Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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INSURANCE COMPANY OF
PITTSBURGH, PENNSYLVANIA

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

I.

Petitioner, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union Fire") adopts by reference the questions presented for review set forth in the Petition for Writ of Certiorari filed by Curtis Campo, Jr., plaintiff-petitioner, on November 2, 1990.

LIST OF PARTIES

The following are the parties to this proceeding:

Curtis Campo
Plaintiff-Petitioner

Electro-Coal Transfer Corporation
Defendant-Respondent

National Union Fire Insurance Company of Pittsburgh, Pennsylvania
Intervenor-Petitioner[1]

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[1] American International Group is the parent company of National Union Fire; there are no subsidiaries of National Union Fire.

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TABLE OF AUTHORITIES

Intervenor-petitioner, National Union Fire, adopts the authorities set forth in the Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, which appear at pages v and vi thereof.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Intervenor-Petitioner

VERSUS

CURTIS CAMPO, JR.,

Plaintiff-Petitioner

AND

ELECTRO-COAL TRANSFER CORPORATION, INC.,

Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 23, 1989.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reproduced in Appendix A.

The order and memorandum of the United States District Court, Eastern District of Louisiana, is unreported and is reproduced in Appendix B.

JURISDICTION

This Petition seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered on July 23, 1989. Curtis Campo, Jr., plaintiff below, petitioned the court for rehearing, and on September 7, 1990, the Court of Appeals denied the request for rehearing. A copy of the Order denying the request for rehearing is reproduced in Appendix C.

This Petition is timely filed pursuant to Rule 13.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this court to review the Judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Intervenor-Petitioner, National Union Fire, here adopts by reference the "Statutes Presented for Review" portion of the Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr., appearing at page 2 thereof.

STATEMENT OF THE CASE

The original Complaint of the plaintiff, Curtis Campo, was filed in the United States District Court for the Eastern District of Louisiana on January 25, 1989. The defendant, Electro-Coal Transfer Corporation, answered on March 22, 1989. National Union Fire intervened in order to assert its lien for workers' compensation benefits paid to or on behalf of Curtis Campo.

The case proceeded to trial with a jury on September 27, 1989, and continued through September 28, 1989. On motion of defendant, Electro-Coal Transfer Corporation, the district court entered a directed verdict, holding that Curtis Campo was a longshoreman and not a seaman as had been alleged. On the basis of this holding, the case was dismissed. The district court's Judgment was appealed by the plaintiff, Curtis Campo, to the United States Court of Appeals for the Fifth Circuit, and again National Union Fire intervened. The Court of Appeals affirmed the district court by its Judgment entered on July 23, 1989. The plaintiff petitioned for rehearing, which was denied on September 7, 1990.

The plaintiff-petitioner, Curtis Campo, filed his Petition for Writ of Certiorari in this court on November 2, 1990. Intervenor-petitioner, National Union Fire, hereby files its Petition for Writ of Certiorari.

REASONS WHY WRIT SHOULD BE GRANTED AND ARGUMENT

Intervenor-petitioner, National Union Fire, here adopts by reference the reasons why writ should be granted and argument in support thereof found at pages 9 - 23 of the Petition for Writ of Certiorari filed by plaintiff-petitioner, Curtis Campo, Jr.

CONCLUSION

Intervenor-petitioner, National Union Fire, files this Petition for Writ of Certiorari in order to preserve its right of recovery of benefits paid to or on behalf of plaintiff-petitioner, Curtis Campo, by National Union Fire pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act.

Respectfully submitted,

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PROOF OF SERVICE

I, David L. Barnett, attorney for the intervenor-petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Petition for Writ of Certiorari on:

Mr. George R. Alvey, Jr.
Ms. Edith Brown Clement
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
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ATTORNEYS FOR DEFENDANT-RESPONDENT

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ATTORNEY FOR PLAINTIFF-PETITIONER

by mailing a copy thereof, postage pre-paid and addressed to their respective offices, this ____ day of _____, 1990.

_____

DAVID L. BARNETT

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 89-3738
Summary Calendar

CURTIS CAMPO,
Plaintiff-Appellant,

VERSUS

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 89 351G)

(April 23, 1990)

Before WILLIAMS, SMITH, AND DUHE, Circuit Judges.

DUHE, Circuit Judge.[1]

In this maritime personal injury suit Curtis Campo

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals the district court's grant of directed verdict on the issue of Jones Act seaman status. Finding that Campo is foreclosed from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm.

On motions for directed verdict we consider all of the evidence, not just that which supports Campo's case, in the light and with all reasonable inferences most favorable to Campo. If the facts and inferences point so strongly and overwhelmingly in favor of Electro-Coal that reasonable men could not arrive at a contrary conclusion, the directed verdict was proper. However, if there is substantial evidence opposed to the motion, the motion for directed verdict should have been denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

Campo was employed by Electro-Coal Transfer at its cargo transfer terminal on the Mississippi River. Electro-Coal employees are divided into two categories, the operations division and the harbor boat division. Employees of the harbor boat division are specifically assigned to one of Electro-Coal's four harbor tugs. The operations department personnel board tugs, barges, and special purpose vessels to position barges and to assist the harbor tugs in opening and closing barge roll-top covers used to protect cargo in the barges. Generally, operations department employees are shoreside dock workers whose main function is to facilitate the loading and unloading of cargo.

Campo worked in the operations division as an operator/trainee and spent most of his time operating a continuous bucket unloader, a machine located on the dock and designed to remove cargo from barges. Campo's posi-

tion required that he conduct general housekeeping duties aboard the barges. Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain the hydraulic winches to which the river barges to be loaded and unloaded are attached. In a 12 hour shift Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll top covers of barges. In his eight years of employment with Electro-Coal, Campo substituted as a deckhand on a harbor vessel only twice. Beyond this, any activity performed by Campo while on any vessel was for the sole purpose of facilitating cargo operations.

Campo was injured when he fell into a barge which was moored at the dock and being prepared to take on cargo. A tug was positioned on one side of the barge, and a line stretched between Campo and the tug was attached to the cover to roll it open. When the cover was opened Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, it either jostled the barge or Campo misstepped, causing Campo to fall into the barge's cargo hold.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), we held that coverage under the LHWCA precluded a finding of Jones Act seaman status. *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039, 1040 (5th Cir. 1987). Section 902(3) of the LHWCA defines an "employee" covered under the Act as "any person engaged in maritime employment,

including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." Campo's employment duties involved the loading and unloading of cargo, traditional longshoring activities. *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir. 1982). Because Campo was engaged in an occupation expressly enumerated in the LHWCA, the district court properly granted a directed verdict in favor of the defendant.

We find Campo's remaining arguments unavailing. Campo first contends that the district court abused its discretion by holding the pre-trial conference on the Friday before jury selection began on Monday. However, Campo fails to point to any prejudice resulting from the timing of the pre-trial conference; in addition, if Campo were surprised by what transpired at the conference, his remedy was to have moved for a continuance. Having failed to do so, Campo waived the right to assert this alleged error on appeal.

Campo also contends that the district court abused its discretion in condemning him to pay Electro-Coal's costs for duplicate copies of depositions of its employees taken by Campo. The law is clear that the court's order was proper because the copies were necessarily obtained for use in the case. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237-38 (5th Cir. 1988). Campo's two final points, that the court erred in excluding certain evidence and in limiting the consideration of Campo's employment duties to the two years directly preceding the accident, are rendered moot because the court considered all of the evidence before him in granting the directed verdict.

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED OCT 12 89

CURTIS CAMPO	CIVIL ACTION
VERSUS	NO. 89-351
ELECTRO-COAL TRANSFER CORP.	SECTION G

J U D G M E N T

The Court having granted defendant's motion for directed verdict, as to seaman's status, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Electro-Coal Transfer Corporation, and against plaintiff, Curtis Campo, dismissing plaintiff's claims.

IT IS FURTHER ORDERED that the intervention of National Union Fire Insurance Company of Pittsburgh, Pennsylvania, is hereby dismissed as moot.

New Orleans, Louisiana, this 8th day of October, 1989.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY Oct 12 1989

MINUTE ENTRY
SEAR, J.
OCTOBER 2, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED OCT 3 89

CURTIS CAMPO	*	CIVIL ACTION
VERSUS	*	NO. 89-351
ELECTRO-COAL TRANSFER CORP.	*	SECTION "G"

MEMORANDUM AND ORDER

Plaintiff, Curtis Campo, commenced this civil action under the Jones Act, 46 U.S.C. § 688, against defendant, Electro-Coal Transfer Corp., to recover for personal injuries sustained after he fell into the cargo hold aboard the Barge SER 126B. A jury trial was held on September 27 and 28, 1989. At the close of plaintiff's evidence on the issue of the plaintiff's status as a Jones Act seaman, the defendants moved for a directed verdict pursuant to Fed. R. Civ. P. 50(a). I granted the motion for directed verdict because on the facts presented at trial, reasonable minds could not differ as to the finding that Curtis Campo was a longshoreman and not a "seaman" as defined by the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), and *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). Thus, plaintiff is not entitled to bring a claim under the Jones Act.

DATE OF ENTRY OCT 5 1989

In *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), the Fifth Circuit set forth the legal standard for granting a directed verdict or a judgment notwithstanding the verdict. The *Boeing* court stated:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. . . . There must be a conflict in substantial evidence to create a jury question.

Id. at 374. The *Boeing* standard applies to a motion for directed verdict denying Jones Act seaman status. *See Wallace v. Oceaneering International*, 727 F.2d 427, 432 (5th Cir. 1984).[1]

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[1] *See also Lormand v. Superior Oil Co.*, 845 F.2d 536, 539 (5th Cir. 1987) (summary judgment proper where no reasonable evidentiary basis supports a jury finding that the injured worker is a seaman), *cert. denied*, 108 S. Ct. 739 (1988); *Kerr-McGee Corp. v. Ma-ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987) (directed verdict proper when record demonstrates that reasonable persons could not draw conflicting inferences which might lead to another conclusion); *Munguia v. Chevron*

The uncontroverted facts in this case demonstrate that the plaintiff, Curtis Campo, worked as a longshoreman. Defendant, Electro-Coal, hired plaintiff to load and unload bulk cargo, classic stevedoring work. To facilitate the loading and unloading operations, plaintiff boarded barges, removed hatch covers, pumped ballast, and caught and released lines. All of these activities were performed in furtherance of the loading and unloading operations. In fact, at least three times during the trial, plaintiff himself testified that any activity performed by him while on different vessels was done for the sole purpose of facilitating the loading and unloading operations.

The first issue for determination in an action brought under the Jones Act is whether the plaintiff is a seaman. Not every maritime worker or person exposed to nautical perils is covered by the Jones Act. *See Munguia v. Chevron Co., U.S.A.*, 768 F.2d 649, 651 (5th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986). If the plaintiff is not a seaman, he is not entitled to bring a suit under the Jones Act. In *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), the Fifth Circuit set forth the test for determining seaman status. The court subsequently modified the *Robison* test in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). In order to be a seaman, the plaintiff must show that he was permanently assigned to a vessel or performed a substantial part of his work on a vessel or an identifiable group of vessels acting together or under one party's control, and that his work contributed to the function of the vessel or group of vessels, the accomplishment of its mission, or the operation or welfare of

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Footnote 1 continued.
Co., U.S.A., 768 F.2d 649 (5th Cir. 1985) (directed verdict proper when there is no reasonable evidentiary basis for a jury's verdict), *cert. denied*, 475 U.S. 1050 (1986).

the vessel or group in terms of its maintenance during either movement or anchorage. *See Robison*, 266 F.2d at 779; *Barrett*, 781 F.2d at 1074.[2]

In *Jones v. Mississippi River Grain Elevator Co.*, 703 F.2d 108 (5th Cir.), *cert. denied*, 464 U.S. 856 (1983), the court affirmed the district court's summary judgment dismissal of the plaintiff's Jones Act claim because the plaintiff was not a seaman. Jones, who worked as a bargeman, performed several duties on the variously-owned barges that came to his employer's facility. Jones placed the sling of a mooring cable onto a cleat, removed the covers from the grain barges' hoppers so that the grain could be removed, and replaced the covers on the grain hopper after the barge was unloaded. "Jones was assigned on a random basis to perform unloading-preparation duties on a considerable number of variously-owned vessels of others . . . ." *Id.* at 109. The court held that Jones was not a seaman because "he did not possess the requisite criterion of a more or less permanent assignment to a vessel or an identifiable fleet or group of vessels." *Id.*

Similarly, in *White v. Valley Line Co.*, 736 F.2d 304 (5th Cir. 1984), the court agreed that the plaintiff was not a seaman and affirmed the district court's summary judgment. White worked as a fleetman at the defendant's

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[2] For other cases discussing the *Robison-Barrett* test, see *Legros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir. 1988); *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735, 737-38 (5th Cir. 1989); *Kerr-McGee Corp. v. Ma-ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987); *Lirette v. Sperry Sun, Inc.*, 831 F.2d 554 (5th Cir. 1987); *Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523, 525-26 (5th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432 (5th Cir. 1985); *White v. Valley Line Co.*, 736 F.2d 304, 305-06 (5th Cir. 1984); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 309-10 (5th Cir. 1984).

fleeting facility. He washed vessels, pumped ballast, and performed minor repairs on the barges. Defendant serviced its own barges as well as the barges of numerous other barge lines. White spent approximately fifty percent of his time tying and releasing tow lines on barges docked at the facility. During the other fifty percent of his time, he washed and repaired the barges as needed. The Fifth Circuit held that White was neither permanently attached to a vessel nor did he perform a substantial part of his work on board a vessel. *Id.* at 306. In holding that White was not a seaman, the court stressed the transitory nature of White's contacts with the vessels and his random and impermanent assignment to any vessel. The court stated that "the question of substantiality comprehends more than a mere quantitative assessment of where the claimant spent the greater part of his working day. . . . [T]he issue of status should be addressed with reference to the nature and locations of his occupation taken as a whole." *Id.* at 306 (citations omitted).

Additionally, in *Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432 (5th Cir. 1985), the court affirmed the district court's summary judgment determination that the plaintiff was not a Jones Act seaman. Mayronne, who was employed as a roustabout, claimed seaman status because his work entailed loading heavy sacks of chemicals and other items onto navigable vessels docked on navigable waterways. The court held that Balfer was clearly a longshoreman and not a seaman. The sporadic work aboard vessels was part of his loading and unloading duties; thus, it did not satisfy the *Robison* test.

In this case, Campo performed classic stevedoring duties: he loaded and unloaded cargo. The only activities performed on barges, such as catching lines and moving hatch covers, were done in preparation for the loading

operations. This plaintiff, like the plaintiffs in *Jones*, *White*, and *Balfer*, fails to qualify as a Jones Act seaman. The mere fact that plaintiff removed hatch covers, pumped ballast, boarded barges, and caught lines does not establish that he was a seaman for the purposes of the Jones Act.

Plaintiff also fails to establish that he was permanently attached to a vessel or an identifiable fleet of vessels, or that he performed a substantial part of his work on vessels. In *Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523, 525-26 (5th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987), the court affirmed the trial court's summary judgment dismissing plaintiff's Jones Act claim because plaintiff was not a seaman. Waguespack's work as a bargeman for Peavey Company entailed removing the covers of the variously-owned grain barges after they entered the unloading slip and replacing the covers once the mechanical arm removed the grain. Plaintiff stood on a small work platform while he removed these barge covers. Additionally, plaintiff attached the barge covers to the hooks on the end of lines connected to the gantry. The *Waguespack* court held that the plaintiff was not a seaman because he was not permanently assigned to a vessel. The court stated, "We reject the notion that fleet of vessels means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated." *Id.* at 526 (citing *Barrett*, 781 F.2d at 1074). The court also held that the small work platform was not a vessel because it was almost exclusively used to facilitate the unloading of cargo from the grain barges. *Id.* at 525.

Similarly, in *Munguia v. Chevron Co. U.S.A.*, 768 F.2d 649 (5th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986), the court affirmed the district court's judgment not-

withstanding the verdict entered after the jury decided that the plaintiff was a seaman. Munguia, employed as a roustabout, worked at various places in the field or on various wells. He would load all the tools and equipment on a boat, and once the boat reached its destination, he would unload all of the tools and equipment. Occasionally, he cleaned the boats and performed minor maintenance work. The court held that Munguia was not assigned to a fleet of vessels; rather, he was randomly assigned to a different vessel everyday. Additionally, the court held that he did not perform a substantial part of his work on vessels.[3]

In *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984), the court affirmed a district court's summary judgment dismissal of plaintiff's Jones Act claim because the plaintiff failed to qualify as a seaman. Buras worked as a coal sampler and temperature taker. During this employment, he tested coal on various barges, ships, and land-based stockpiles. The court noted that Buras was randomly assigned to a vessel or land-based stockpile and that his contact was short in duration and limited to the administration of the temperature test. The court then held that Buras was not permanently assigned to a vessel or fleet of vessels because his connection was merely transitory. The court also rejected Buras' argument that his contacts with vessels were substantial, and stated that incidental and temporary duty will not suffice to meet the substantiality requirement. *Id.* at 311.

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[3] *See also Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), *cert. denied*, 454 U.S. 818 (1981). In *Guidry*, the court affirmed the district court's summary judgment dismissal of plaintiff's Jones Act claim because the plaintiff was not permanently attached to a vessel because he never continually or regularly worked on a particular rig, and he was randomly assigned to vessels.

The Fifth Circuit again considered the issue of permanent assignment to a vessel in *Lirette v. N.L. Sperry Sun, Inc.*, 831 F.2d 554 (5th Cir. 1987). The *Lirette* court held that the plaintiff was not a Jones Act seaman because the twenty-three special purpose drilling rigs he worked aboard were not under the common ownership or control of his employer nor did they share a nexus that would support a finding that they were a fleet. The court noted the limited exception provided in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). In *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984), the court clarified the *Bertrand* exception. The *Buras* court stated,

> Although *Bertrand* thus expanded the concept of a fleet to encompass vessels used, but not owned or chartered, by the employer, we do not believe that it can be fairly read so broadly as to confer seaman status on every worker whose duties place him aboard a large number of randomly-owned and controlled vessels for short periods of time that aggregate to comprise a substantial portion of his working time, nor do we believe that *Bertrand* rejected the identifiable or recognizable fleet requirement established by our prior cases.

Buras, 736 F.2d at 311. The *Lirette* court further noted that the limited exception established in *Bertrand* involves persons who perform traditional duties of blue water seamen. In this case, Campo's duties, like the duties performed by the plaintiff in *Lirette*, closely resemble those of a transitory maritime worker. "[T]he distinction between seamen and transitory maritime workers is fundamental and may not be blurred." *Lirette*, 831 F.2d at 557.

In this case, plaintiff was not permanently assigned

to a vessel or an identifiable fleet of vessels. Each day, plaintiff loaded and unloaded cargo on randomly assigned barges or vessels. These random assignments fail to satisfy the fleet of vessels requirement of *Robison.* Although plaintiff participated in topping-off operations, he was not permanently assigned to work on this topping-off vessel. In fact, he only worked on the topping-off vessel four times in two years. Plaintiff was neither permanently assigned to a vessel nor did he perform a substantial part of his work on a vessel. Thus, plaintiff is not a seaman entitled to Jones Act relief.

Moreover, plaintiff's work activities, loading and unloading cargo, clearly demonstrate that he was a longshoreman. In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1013 (1988), the court held that when a workman engaged in one of the occupations enumerated in the Longshore and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. § 901, is injured, he is unqualifiedly covered by the LHWCA and therefore, ineligible for benefits under the Jones Act. In light of the plaintiff's employment as a longshoreman, he is ineligible for relief under the Jones Act.

Plaintiff cannot bring a claim under the Jones Act because he fails to qualify as a seaman under the *Robison-Barrett* test. Additionally, *Pizzitolo* precludes this plaintiff from bringing a Jones Act claim because he is unqualifiedly covered under the LHWCA. Accordingly, plaintiff's Jones Act claim is DISMISSED WITH PREJUDICE at his costs.

Let judgment be entered accordingly.

/s/ Morey L. Sear

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED SEP 7 1990

No. 89-3738

CURTIS CAMPO,
Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER
CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/23/90, 5 Cir., 198__, ___F.2d___)

(September 7, 1990)

Before WILLIAMS, SMITH and DUHE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhe, Jr.
United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 15 1991
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NOs. 90-722 & 90-956

In the Supreme Court of the United States

OCTOBER TERM, 1990

CURTIS CAMPO, JR.
Plaintiff-Petitioner

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., Plaintiff-Petitioner, and
ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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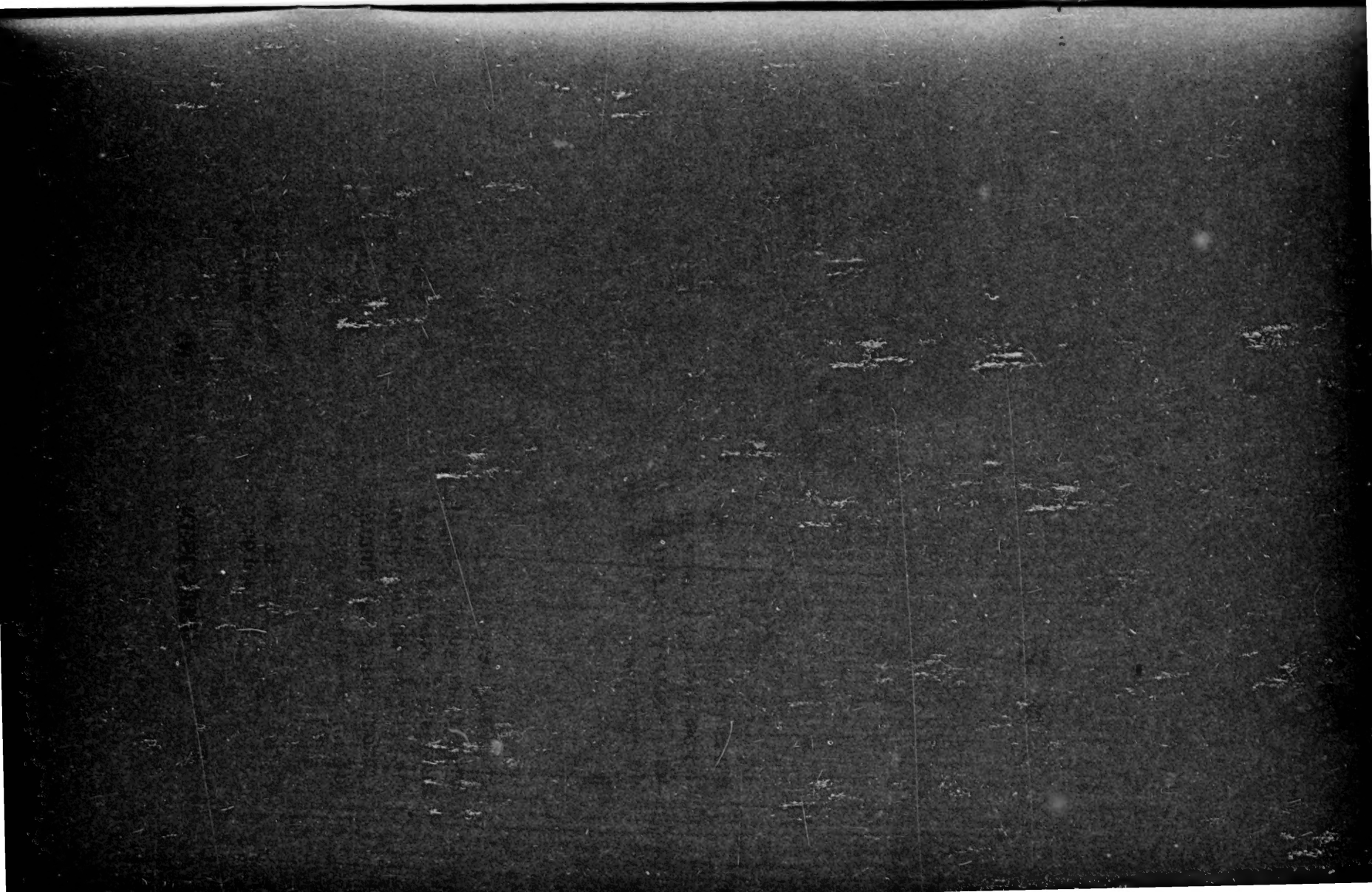

QUESTIONS PRESENTED

Petitions No. 90-722 and 90-956 present the same questions arising from the same case. These questions are:

A. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688, and finding that Petitioner was engaged in "maritime employment" as defined in Section 902(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

B. Whether the Circuit Court of Appeals for the Fifth Circuit correctly applied Supreme Court precedent, the Jones Act, and the Longshore and Harbor Workers' Compensation Act in finding that Petitioner, a shore-based terminal worker who assisted with the loading and unloading of vessels, was not a Jones Act seaman, but rather a worker covered under the Longshore and Harbor Workers' Compensation Act.

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STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. Sec. 688, and the general maritime law. After hearing all of plaintiff's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act and that Campo's remedy against his employer was under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 *et seq.* ("LHWCA"), since the work Campo performed related to the loading and unloading of vessels, the traditional function of a longshoreman/harbor worker. Appendix at A-6.[1] This determination was affirmed by the United States Court of Appeals for the Fifth Circuit. Appendix at A-3 - A-4.

Petitioner, National Union Fire Insurance Company ("National Union"), is the Longshore and Harbor Workers' Compensation insurer of Electro-Coal. National Union filed an Intervention in Campo's suit seeking recoupment of compensation and medical benefits received by Campo in accordance with the LHWCA in the event it was determined that Campo was a seaman. National Union filed a separate Petition for Certiorari adopting by reference the arguments and authorities cited in Campo's Petition for Certiorari.

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[1] Petitioners in No. 90-722 and 90-956 filed identical Appendices with the same pagination. The opinions of the court of appeals and district court are unpublished and are reproduced in both Appendices at A-1 and A-6 respectively, and citations to these opinions are in the form "Appendix at A-____."

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either onto other barges or seagoing vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-2. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in a cab, above the dock, and pull various levers to move cargo onto conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting that Campo was permanently

assigned to work aboard any of these vessels as a member of the crew. Appendix at A-11.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo carrying vessels, both river and ocean going, are owned and operated by many different companies. None of the cargo carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-8. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-3 - A-4.

Campo was injured when he fell into a barge, moored at a dock, which he was aboard preparing it to take on cargo. Appendix at A-3. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-3. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crewmember nor did Campo perform a substantial amount of his work on vessels. Appendix at A-11.

Campo brought suit against Electro-Coal under the

Jones Act, contending that he was a "seaman." Electro-Coal defended contending, *inter alia*, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, but was covered by the LHWCA and engaged in "maritime employment" as defined in Section 902(3) of the LHWCA. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

ARGUMENT

1. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not involve any issues of constitutional law, federal statutory law, or federal maritime law. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the LHWCA, the Jones Act, and the precedents of this Court.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp v. Western Well Works, Inc.*, 261 U.S. 378, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to reargue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." *Rice*, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED BOTH THE JONES ACT AND THE LHWCA IN DETERMINING THAT CAMPO IS COVERED UNDER THE LHWCA.

A. CAMPO WAS NOT A JONES ACT SEAMAN.

Under the Fifth Circuit's precedents of *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), and *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), a maritime worker qualifies as a seaman if:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or on an identifiable fleet of vessels acting together or under one control and;

2. The work he performed contributed to the function of the vessel or the accomplishment of its mission.

781 F.2d at 1074 - 76. The undisputed facts established

that Campo was not a crew member of any vessel, nor was he assigned permanently to any vessel or fleet of vessels, nor did he perform significant work on vessels. Appendix at A-13 - A-14.

The requests for certiorari rest on the grounds that in most cases the question of seaman status should be determined by the jury. This completely undermines the purpose of a directed verdict. In Jones Act cases "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. *See, e.g., Landry v. Hunthnance Drilling Company*, 889 F.2d 1469, 1470 (5th Cir. 1989); *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of the federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. *Galloway v. United States*, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 333-35 (1979) (offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51 (1986). In *Anderson*, this Court noted that "judges are not required to submit a question to the jury. . . unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). Campo put forth no evidence

from which a jury could infer that he was permanently assigned to a vessel or fleet of vessels.

B. CAMPO WAS A SHORE-BASED TERMINAL WORKER COVERED BY THE LHWCA.

All of the evidence presented indicated that Campo was a shore-based harbor worker who was involved with the loading and unloading of vessels, classic stevedoring work covered by the LHWCA. Appendix at A-2-A-4. Campo was engaged in "maritime employment" on navigable waters within the meaning of Section 902(3) of the LHWCA, Title 33 United States Code, making the LHWCA Campo's remedy against Electro-Coal. Appendix A-4. Section 902(3) of the LHWCA provides:

> The term "employee" means any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship builder, and ship breaker. . . .

(emphasis added.)

Under *Pizzotolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988), and other precedents of this Court, Campo is precluded from recovering under the Jones Act since the Jones Act and the LHWCA are mutually exclusive statutes. In *Pizzotolo*, another claim involving Electro-Coal's terminal, the plaintiff was a shore-based terminal worker, like Campo. Pizzotolo was injured as he attempted to repair one of the conveyors used to load and unload barges. The court held that plaintiff was a shore-based harbor worker who had limited contact with vessels and concluded that Pizzotolo

was not a seaman.

The decisions below are in accord with the decisions of this Court holding that the Jones Act and the LHWCA are mutually exclusive statutes. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 n.12 (1971); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 6-7 (1946); *Norton v. Warner Co.*, 321 U.S. 565, 570 (1944).

C. SUPREME COURT PRECEDENT.

Petitioners ignore the recent opinions of this Court interpreting the LHWCA which resolve the questions raised by Petitioners. These decisions establish that Campo was covered under the LHWCA. In *Herb's Welding v. Gray*, 470 U.S. 414 (1985), the Court ruled that the term "maritime employment" appearing in Section 902(3) of the LHWCA *was not* limited to the occupations therein enumerated: " 'Maritime employment' is not limited to the occupations specifically mentioned in § 2(3). . . ." 470 U.S. at 423. Further, by use of the word "including" in Section 902(3), "Congress indicated that the specifically mentioned occupations are not exclusive." *Id.* at 423 n.9 (citing *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 - 78 n.7 (1979) and H.R. Rep. No. 92-1441, p.11 (1972)). In *Herb's Welding*, this Court found the scope of coverage of the LHWCA to be:

> [The LHWCA,] as amended, 33 U.S.C. § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or

> building a vessel, § 903(a). Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test.

470 U.S. at 415-16 (footnote omitted).

Campo meets both the "situs" and "status" requirements of the LHWCA. Campo's accident occurred on navigable waters aboard a barge which he was aboard preparing for loading. Appendix A-3-A-4. In *Director v. Perini North River Associates*, 459 U.S. 297 (1983), the claimant was injured on the deck of a cargo barge afloat in the Hudson River, while giving directions to a crane operator. A line which was being used to keep the cargo in place snapped as the cargo was in the process of being unloaded. After an extensive review of the history and purpose of the LHWCA, the Supreme Court held that the claimant was a covered employee under Section 902(3) of the LHWCA:

> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) and is covered under the LHWCA, providing, of course, that he is an employee of a statutory "employer" and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their duties upon navigable waters.

Id. at 324 (footnotes omitted).

In *Chesapeake and Ohio Railway Company v.*

Schwalb, 110 S.Ct. 381 (1989), this Court again found that shore-based terminal workers who were injured at facilities where coal was transferred to and from vessels were covered by the LHWCA, and *not* the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51-60, which the Jones Act incorporates and follows. Much like Electro-Coal's terminal, the terminals in *Schwalb* consisted of conveyor belts which were used to load and unload coal from vessels. The workers in *Schwalb* performed general housekeeping services, repairs, maintenance, and other services which were integral to the loading and unloading operations of their employers, and were hence covered by the LHWCA:

> The employment that is maritime within the meaning of § 902(3) expressly includes the specified occupations but obviously is not limited to those callings. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, n.9, 105 S.Ct. 1421, 1427, n.9, 84 L.Ed.2d 406 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78, n. 7, 100 S.Ct. 328, 334, n. 7, 62 L.Ed.2d 225 (1979). . . .
>
> * * *
>
> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. *Such employees are engaged in activity that is an integral part of and essential to those overall processes.* That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo.

110 S.Ct. at 384-85 (emphasis added). There can be no doubt that the work Campo performed was "an integral or essential part of loading or unloading a vessel." *Id.* at 384.

Petitioners' proposed interpretation of the LHWCA is contrary to the express wording of the LHWCA and the precedents of this Court, and would result in every shore-based harbor worker being deemed a seaman. The lower courts' determinations are in full accord with the LHWCA and the decisions of this Court.

The cases relied on by Petitioners are inapposite and predate the above-mentioned decisions of this Court. The original opinion in *Legros v. Panther Services Group, Inc.*, 874 F.2d 953 (5th Cir. 1989), was vacated by the Fifth Circuit when it granted rehearing *en banc*. 874 F.2d at 954. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the worker was found not to be a seaman where the work was performed on a vessel out of navigation with "neither captain nor crew." 342 U.S. at 190-91. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), the plaintiff, unlike Campo, "had no duties with the handling of cargo and no shore duties." 321 U.S. at 568. *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252 (1958), involved a plaintiff who was assigned to work on a single vessel on the high seas. Similarly, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), did not involve a shore-based terminal worker, but rather concerned a crewmember assigned to a dredge who performed deckhand duties and had "a significant navigational function." 352 U.S. at 373-74.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or fleet of vessels. Campo was covered under the LHWCA since his work involved the loading and unloading of barges at a marine terminal on the Mississippi River. The decisions of the lower courts correctly applied the Jones Act, the LHWCA, and the precedents of this Court. The questions raised by Petitioners have been resolved by the earlier decisions of this Court which interpret the LHWCA and discuss the term "maritime employment" as used in Section 902(3) of the LHWCA.

Respectfully submitted:

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APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.